Supreme Court, U.S.
FILED
JUN 20 1995
OFFICE OF THE CLERK

(2)

No. 94-1728

In The

Supreme Court of the United States

October Term, 1994

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,

Petitioner,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; and MARK HARSHMAN, as County Attorney for Blaine County, Montana,

Respondents.

On Petition for Writ of Certiorari From An Appeal To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS*
Assistant Attorney General
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
**Counsel of Record*

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the State of Montana have authority to enforce its licensure laws with respect to the sale of alcoholic beverages in Indian country through criminal proceedings against Indians who fail to comply with those laws?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

I. State Court Proceedings 1

II. Federal Court Proceedings 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

Implicit in the Undisputed Grant of State Regulatory Jurisdiction Under 18 U.S.C. § 1161 Is Authority to Enforce Such Jurisdiction Through Criminal Sanctions 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Brown v. District Court,
238 Mont. 248, 777 P.2d 877 (1989) 1, 2

Rice v. Rehner,
463 U.S. 713 (1983) 1-8

United States v. Mazurie,
419 U.S. 544 (1975) 4, 5

Younger v. Harris,
401 U.S. 39 (1971) 2, 3

STATUTES:

Montana Code Annotated (1989)

§ 16-6-301(1) 1, 6
§ 16-6-302 1

Public Law 280 7

United States Code

Tit. 18, § 1154 . . . . . 4, 5-7
Tit. 18, § 1156 4-6
Tit. 18, § 1161 1-8
Tit. 25, § 1321-1322 7
Tit. 28, § 1257(a) 2

TABLE OF AUTHORITIES

Page

United States Constitution

Amend. XI 2

MISCELLANEOUS

Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation, 78 I.D. 39 (1971) 7

Federal Indian Law (1958) 6

Respondents Joseph P. Mazurek, as Attorney General for the State of Montana, and Mark Harshman, as County Attorney for Blaine County, Montana, respectfully submit their brief in opposition to petition for writ of certiorari

---

STATEMENT

I. State Court Proceedings

This controversy arose from a criminal action filed in February 1988 in the District Court for the Seventeenth Judicial District of the State of Montana against Caroline Ann Brown and Harley Leroy Brown. The criminal information alleged that the Browns, who operate a grocery store near Hayes, Montana, within the exterior boundaries of the Fort Belknap Indian Reservation, had possessed, offered for sale, and sold alcoholic beverages without appropriate state licensure under Mont. Code Ann. § 16-6-301(1) (1989). The penalty for the alleged violation is a fine of not less than $1,000 or more than $5,000, imprisonment in the state prison for not less than one year or more than five years, or both such fine and imprisonment. Mont. Code Ann. § 16-6-302 (1989).

The Browns pled not guilty and later moved to dismiss the information on jurisdictional grounds, arguing Montana lacked criminal jurisdiction over them because they were Indians. The state district court concluded that jurisdiction to maintain the state criminal proceeding against the Browns was granted by 18 U.S.C. § 1161. They then petitioned the Montana Supreme Court for interlocutory review of the district court's denial of their dismissal motion. The Supreme Court accepted supervisory control jurisdiction in December 1988 and affirmed the district court in July 1989. *Brown v. District Court*, 238 Mont. 248, 777 P.2d 877 (1989) (App. at 17). Relying on *Rice v. Rehner*, 463 U.S. 713 (1983), the court reasoned that 18 U.S.C. § 1161 authorized imposition of both

state civil and criminal laws regulating the possession and sale of liquor in Indian country against all individuals, irrespective of their tribal membership status. (App. at 26-27.) The Browns did not seek review of such decision by this Court under 28 U.S.C. § 1257(a), and the state district court proceedings against the Browns remain pending.

II. Federal Court Proceedings

The Petitioner initiated the action below against the State of Montana in December 1989, alleging in part that the latter had wrongfully sought to enforce state criminal laws with respect to liquor law violations against tribal members or other Indians for conduct within the Fort Belknap Indian Reservation. The Petitioner claimed the State's exercise of criminal jurisdiction interfered with tribal self-government interests.

The State moved for summary judgment on the grounds that jurisdiction over the State was barred by the Eleventh Amendment, that abstention principles developed under *Younger v. Harris*, 401 U.S. 39 (1971), and later decisions required dismissal of the action, and that the State possessed criminal jurisdiction over on-reservation violations of state liquor laws by Indians pursuant to 18 U.S.C. § 1161. The district court granted the State's motion on the Eleventh Amendment ground. (Pet. App. at 28 n.10.) The court, however, also expressed its conclusion that Montana lacked jurisdiction to prosecute Indians for violation of the state liquor laws when such violation occurred within Indian country, relying on Justice Blackmun's dissent in *Rice v. Rehner*, 463 U.S. 713, 735 (1983) for the proposition that federal authority to prosecute Indian country liquor-related offenses is vested exclusively within the United States. (Pet. App. at 39-40.) It accordingly granted the Petitioner leave to amend the complaint, and the tribe did amend, naming as defendants the Montana Attorney General and the county attorney for Blaine

County where the Fort Belknap Reservation is located and who is responsible for the Browns' prosecution. (App. at 7.) In response to those defendants' motion to vacate the judgment entered after the amended complaint was filed, the district court addressed, and rejected the *Younger*-based abstention defense and adhered to its previous determination with respect to the scope of state authority under § 1161. (App. at 3, 5.)

The Court of Appeals affirmed the District Court's refusal to abstain but, like the Montana Supreme Court, held that § 1161 authorized the exercise of state criminal jurisdiction over Indians with respect to violation of Montana liquor laws.[1] As to the second issue, the court reasoned that, while *Rice* was not concerned specifically with the issue of state criminal jurisdiction, it did make "several references to criminal prosecution in the area of liquor regulation," cited favorably a United States Department of the Interior treatise published shortly after § 1161's enactment, which assumed state criminal prosecution is available against any individual not possessing a valid liquor license, and disapproved a 1971 "Interior Department decision which concluded that states could not prosecute Indians for violations of state liquor laws." (Pet. App. at 16-17.) It found the District Court's construction of § 1161 unpersuasive because, contrary to *Rice*, it "would give the states no power at all[] but merely allow the federal government to enforce state law" and because, logically extended, it would deprive even tribes of the authority to enforce their liquor ordinances against Indians. (*Id.* at 21-22.)

---

[1]The Respondents have filed a cross-petition for writ of certiorari directed to the Court of Appeals' disposition of the abstention issue.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly determined that *Rice v. Rehner*, 463 U.S. 713 (1983), governs resolution of the Petitioner's claim that Montana lacks jurisdiction to prosecute the Browns. *Rice* arose from a challenge to California's licensure requirement as to persons selling liquor for off-premises consumption--the same requirement at issue in the Browns' prosecution--and unequivocally established that States have the authority under 18 U.S.C. § 1161 to regulate all liquor transactions in Indian country, including those by Indians. Part and parcel in that regulatory authority is the power to impose sanctions for failure to comply with state law. Any other result would eviscerate *Rice* and its determination that § 1161, as an explicit delegation of authority to the States, did far more than simply make their law the "standard of measurement" for purposes of federal prosecution under 18 U.S.C. §§ 1154 and 1156. *Rice* is clearly dispositive, and there is thus no important question of federal law presented by the petition which requires this Court's attention.

ARGUMENT

Implicit in the Undisputed Grant of State Regulatory Jurisdiction Under 18 U.S.C. § 1161 Is Authority to Enforce Such Jurisdiction Through Criminal Sanctions.

The Court recognized in *United States v. Mazurie*, 419 U.S. 544, 547 (1975), that 18 U.S.C. § 1161 represents "local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated." It specifically rejected the contention that Congress could not delegate such regulatory authority to tribes with respect to nonmembers, concluding that, irrespective of whether tribes had the inherent authority to so regulate, "[i]t is

necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils *this portion of its own authority* 'to regulate Commerce . . . with the Indian tribes.'" *Id.* at 557 (emphasis added). *Mazurie* thus established that § 1161 was intended to grant tribes plenary power to regulate liquor sale and use within their respective reservations--power they historically had not possessed.

Mazurie left unanswered the question of whether States were given, as the literal language of § 1161 suggests, concurrent authority to apply their liquor laws in Indian country to all persons, Indians and non-Indians alike. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Court answered this question affirmatively. *Rice* arose from a declaratory judgment action filed by a member of the Pala Tribe alleging that she was not subject to California liquor regulations with respect to her business on the Pala Reservation. *Id.* at 715 n.2. The court of appeals held that the State lacked authority because, "if Congress wished to remove 'its veil of preemption,' it needed to do so by an express statement that the State had jurisdiction to impose its licensing requirement." *Id.* at 717. This Court disagreed since, "[b]y enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the [pre-§ 1161] federal prohibition" against introducing liquor into Indian country. *Id.* at 733. It further concluded that "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Id.* at 734. *Rice* accordingly established that § 1161 was intended not only to make compliance with state law one component of avoiding federal prosecution under 18 U.S.C. §§ 1154 and 1156 but also to grant States independent authority to regulate directly the reservation possession and sale of alcohol by non-Indians, nonmember Indians, and members like the plaintiff in that case.

The issue thus becomes whether, in light of Montana's indisputable authority to regulate all reservation liquor transactions, it nonetheless is foreclosed from enforcing that regulatory authority through applicable civil or criminal sanctions. To credit that proposition would mean that only the federal government, acting as prosecutor under 18 U.S.C. §§ 1154 and 1156, could remedy noncompliance with state or tribal law and that such law does nothing more than provide the "standard of measurement" for determining whether federal statutes governing liquor transactions in Indian country have been violated. The Court in *Rice*, however, concluded that state law was not simply a "standard of measurement" incorporated into federal law for purposes of liquor licensing and that a State's liquor law would apply of its own force to *all* persons within Indian country. 463 U.S. at 726. Because the power to regulate necessarily includes the power to sanction for noncompliance with the regulation, the fundamental analytical predicate underlying *Rice* counsels directly against the Petitioner's position.

Moreover, as the Court of Appeals observed, *Rice* specifically suggested that States may prosecute Indians and non-Indians for liquor law violations. First, this Court held that, for purposes of liquor regulation by States, Indians and non-Indians are identically situated. Implicit in this holding is the notion that, to the extent non-Indians may be subject to state sanctions for liquor-law noncompliance, so may Indians. Again, tribal members and other Indians are not granted preferential treatment or "super citizen" status under § 1161. The Petitioner cannot, and apparently does not, argue non-Indians are exempt from state criminal prosecution for reservation-based violations of Mont. Code Ann. § 16-6-301(1), and a contrary claim with respect to Indians, if accepted, would just as obviously destroy the regulatory symmetry envisioned by § 1161. The Court thus cited favorably the Department of the Interior's treatise, *Federal Indian Law* 382-83 (1958), for the principle that § 1161 authorized "state prosecutions for failure to have a state

[liquor] license" against Indians. 463 U.S. at 732; *accord id.* at 729-30.

Second, the Court disapproved a later Department of the Interior opinion, *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I.D. 39 (1971). 463 U.S. at 730 n.13. In part the disapproved opinion stated:

> We do not believe Congress, in enacting [§ 1161], intended to make state liquor laws applicable to the tribe or tribal members on a reservation when a tribe wished to terminate Federal prohibition. If Congress had intended to impose state law with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U.S.C. sec. 1161, which it did not do. Rather, we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation.
>
> If, for example, the tribe has terminated Federal prohibition, and a tribal member commits an act or engages in a transaction in intoxicating beverages which is not in conformance with state law, the member would be subject to prosecution in the Federal courts for violation of the applicable Federal Indian liquor law. *See* 18 U.S.C. sec. 1154 (1964). However, the tribal member is not subject to prosecution in state court since Montana has not assumed the requisite jurisdiction over the Rocky Boy's Reservation under either Public Law 280 . . . or under the Civil Rights Act of 1968 [25 U.S.C. § 1321-1322]. In such a

> situation, state criminal law does not apply to an Indian in "Indian country." . . .
>
> However, if a non-Indian does not conform with the liquor laws of Montana while on an Indian reservation, the Federal courts and the state courts may both have jurisdiction over him for violations of separate state and Federal law, assuming a question of double jeopardy is not presented. It is well settled that non-Indians are subject to state law when committing crimes within "Indian country."

78 I.D. at 40-41 (citations & footnote omitted). *Rice* unequivocally rejected the reasoning of this opinion which, at its core, was premised on granting tribes and their members a unique dispensation from state liquor-law regulation and the consequences of noncompliance with that regulation.

The Petitioner nevertheless argues that the ordinary lack of state criminal jurisdiction over Indians with respect to Indian country offenses dictates a different result. Whatever the preemptive impact of federal criminal statutes in other contexts, the fact remains that § 1161, as construed in *Rice*, contains a special delegation of authority to States and tribes. This delegation negatives any legitimate claim that States are preempted from applying criminal, but not civil, sanctions to remedy noncompliance with their liquor laws. It also negatives any legitimate claim that the petition presents an important and undecided question of federal law.

CONCLUSION

The Respondents respectfully request that the petition for writ of certiorari be denied.

JOSEPH P. MAZUREK
Attorney General
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS*
Assistant Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

**Counsel of Record*

June 1995

APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

Memorandum and Order Denying Defendant's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (October 19th, 1993) 1

Amended Complaint, *The Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Donald Ranstrom, Blaine County Attorney, State of Montana, and Marc Racicot, Attorney General, State of Montana*, No. CV-89-215-GF (April 30, 1992) (attachments not included) 7

Opinion of the Montana Supreme Court, *Caroline Ann Brown and Harley Leroy Brown v. District Court for the State of Montana, in and for the County of Blaine, and The Honorable Leonard Langen*, No. 88-487 (July 19, 1989) 17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, Plaintiff, vs. JOSEPH P. MAZUREK, as Attorney General for the State of Montana, and DONALD A. RANSTROM, as County Attorney for Blaine County, Montana, Defendant.	NO. CV-89-215-GF MEMORANDUM AND ORDER (Filed Oct. 19, 1993)

The issue presented for resolution in this action is whether or not the State of Montana possesses jurisdiction to criminally prosecute an Indian person for a violation of the "liquor" laws of the State of Montana, when that violation occurs within the boundaries of the Fort Belknap Indian Reservation. Pursuant to Judgment entered on May 20, 1992, this court answered that inquiry in the negative and entered summary judgment, pursuant to Fed.R.Civ.P. 56, in favor of the plaintiff, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, the governing body of the Reservation. The matter is presently before the court upon motion of the

defendants requesting relief from the Judgment pursuant to Fed.R.Civ.P. 60(b).[1]

---

[1] The court deems it imperative to recount the procedural history attendant the motion now before the court given the significant period of time which has elapsed since submission of the motion to this court and the present ruling. Subsequent to the entry of Judgment the defendants, on June 3, 1992, presented the court with a motion styled as a "Motion to Withdraw" the Judgment. The defendants did not state whether the motion was presented pursuant to Fed.R.Civ.P. 59(a) or was designed to seek the relief available under Fed.R.Civ.P. 60(a) or (b). More importantly, it was not clear, from the text of the motion, whether or not the defendants were seeking a substantive change in the Judgment since the basis of the motion lay in the assertion that the defendants were not served with a copy of the plaintiff's amended complaint.

Subsequent to the presentation of the referenced motion, and prior to any response being presented by the plaintiff, the defendants, on June 17, 1992, filed a notice of appeal relative to the final Judgment entered on May 20, 1992. The appeal was docketed with the United States Court of Appeals for the Ninth Circuit on June 23, 1992. The defendants, however, ultimately moved for voluntary dismissal of the appeal pursuant to Fed.R.App.P. 42(b); a motion which was granted on August 27, 1992.

Subsequent to the voluntary dismissal of the appeal, the defendants did not file a formal pleading with this court advising the court of their intention to seek disposition of the referenced motion to withdraw. Based upon an informal inquiry by counsel for the defendants on June 2, 1993, the court convened a status conference. Pursuant to the discussion elicited at the conference, the court afforded the defendants a period of time within which to supplement their motion. Upon review of the papers submitted by the defendants in support of their motion, the court finds that the motion is predicated upon a purported error of law and, hence, the motion is properly characterized as one

Having considered the defendants' request that the court reconsider the rationale it previously expressed rejecting the notion that the State of Montana could assert criminal jurisdiction over an Indian person for a violation of the liquor laws of the State of Montana that occur within the boundaries of the Fort Belknap Indian Reservation, the court deems it appropriate to AFFIRM the rationale expressed in its memorandum and order of April 22, 1992. An additional point raised by the defendants, and not previously addressed, bears comment.

As an alternate basis in support of their request for relief from the Judgment, the defendants invoke the *Younger* abstention doctrine and implore the court to refrain from exercising jurisdiction over this controversy. Generally stated, the *Younger* abstention doctrine, which stems from *Younger v. Harris,* 401 U.S. 37 (1971), recognizes that a federal court should not enjoin a pending state criminal prosecution. As the defendants accurately note, the rationale of *Younger* is equally compelling in a suit for declaratory relief since in both situations federal court intervention in state criminal proceedings is undesirable, when the federal claims could be presented in ongoing state judicial proceedings that concern important state interests. *Samuels v. Mackell,* 401 U.S. 66 (1971).

This action, of course, has its genesis in the criminal prosecution, by the State of Montana, of an Indian person for a violation of that entity's "liquor" laws that occurred upon the Fort Belknap Indian Reservation. Although the

---

cognizable under Fed.R.Civ.P. 60(b). *See, Liberty Mutual Ins. Co. v. EEOC,* 691 F.2d 438 (9th Cir. 1982) (holding that errors of law are cognizable under Rule 60(b)).

present action is prosecuted by the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, the declaratory relief sought, the defendants submit, constitutes unwarranted federal interference in an ongoing state criminal proceeding. In the opinion of the defendants, the rationale of *Younger* and its progeny dictate that this court refrain from exercising jurisdiction. The court, however, finds the defendants' reliance upon *Younger* to be misplaced for two reasons.

First, *Younger* does not bar individuals who are nonparties in the related state proceeding, who possess the requisite standing in federal court, from seeking federal relief. *See, Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927-29 (1975). The Community instituted this declaratory judgment action challenging the State of Montana's authority to prosecute Indian persons for criminal violations of state liquor laws that occur within Indian country. While the state prosecution of an individual Indian person for violation of the state liquor laws obviously prompted the Community to pursue federal relief, the Community must be considered as standing alone in determining whether the dictate of *Younger* compels this court to refrain from exercising jurisdiction over the Community's claim for declaratory relief. *See, Doran*, 422 U.S. at 928-929. Because the Community, in the opinion of this court, possesses standing to prosecute this action for declaratory relief under 28 U.S.C. § 1362, the state is precluded from relying upon the *Younger* abstention doctrine to preclude the Community from obtaining the declaratory relief requested.

Second, and more importantly, there does not exist a legitimate basis for invoking the *Younger* doctrine under

the circumstances of this case. The holdings of the Supreme Court do not suggest that the existence of any proceeding between a state and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies. *Moore v. Sims*, 442 U.S. 415, 423 n.8 (1979). Rather, it is when federal intervention poses a "threat to our federal system . . . by displacement of state courts by those of the National Government" that abstention is warranted. *Moore*, 442 U.S. at 423. The "threat" has been recognized as sufficient, not only where criminal proceedings or quasi-criminal proceedings are pending against the federal plaintiff, *see, Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), but where other "vital" state concerns are implicated. *Moore*, 442 U.S. at 423, *citing, Juidice v. Vail*, 430 U.S. 327 (1977) (enforcement of contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (safeguarding fiscal integrity of state public assistance programs).

The imperative consideration underlying the abstention doctrine is, of course, "the notion of 'comity', that is, a proper respect for state functions." *Huffman*, 420 U.S. at 601, *quoting, Younger*, 401 U.S. at 44. Consequently, the doctrine is narrow in scope and unless vital state interests are at stake, federal courts have an "unflagging" obligation to exercise their jurisdiction. *Miofsky v. Sup. Ct.*, 703 F.2d 332, 338 (9th Cir. 1983). The notion of "comity", however, is simply not compelling in the instant case. The reach of criminal jurisdiction over Indian persons for crimes committed in Indian country is a matter of federal interest, not a vital state interest. Contrary to the assertion of the defendants, this court must exercise jurisdiction over the Community's claim.

Therefore, for the reasons set forth herein, IT IS HEREBY ORDERED that the defendants' motion for relief from the Judgment is DENIED.

DATED this 19 day of October, 1993.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

JAMES L. VOGEL
Attorney at Law
P.O. Box 525
Hardin, Montana 59034
(406) 665-3900

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE FORT BELKNAP INDIAN COMMUNITY of the FORT BELKNAP INDIAN RESERVATION. Plaintiff, vs. DONALD RANSTROM, Blaine County Attorney, State of Montana, and MARC RACICOT, Attorney General, State of Montana. Defendant.	Case No. CV-89-215-GF AMENDED COMPLAINT

I.

Plaintiff, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation is a recognized Indian community as established by the Gros Ventre and Assiniboine Tribes under the Indian Reorganization Act of 1934, and is currently a sovereign body with headquarters located at Fort Belknap Agency, County of Blaine, State of

Montana, and their mailing address is P.O. Box 249, Harlem, Montana 59526.

II.

Defendant, Donald Ranstrom, is the duly elected County Attorney for Blaine County, Montana, is responsible for the initiation of prosecutions within his jurisdiction, under state law, and maintains his office at the Blaine County Courthouse, Chinook, Montana 59523.

III.

Defendant, Marc Racicot, is the duly elected Attorney General for the State of Montana, is responsible for prosecutions of actions within the State of Montana when County Attorneys have a perceived or real conflict, otherwise provides prosecution assistance to local county attorneys, and maintains his office at the Justice Building, 215 No. Sanders, Helena, Montana 59620-1401.

III.

This is an action for declaratory judgment pursuant to 28 U.S.C. 2201 for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears, and further, for injunctive relief to prevent further wrongful acts on the part of defendants.

IV.

This Court has jurisdiction of this action based on 28 U.S.C. 1331(a) and 28 U.S.C. 1362 and 28 U.S.C. 1343 and 18 U.S.C. 1161, as federal questions control this case and arise under said provisions.

V.

That on or about January 6, 1988, a Complaint was filed in the Fort Belknap Indian Community Tribal Court citing Chin Martin, Harley Brown, and Caroline Brown for violations of Sect. 1.81. Title V of the Fort Belknap Tribal Code. That pursuant such complaint, warrants to arrest were issued for Caroline and Harley Brown, together with search warrants authorizing the search of their grocery store located near Hays, Montana, within the boundaries of the Fort Belknap Indian Reservation. That pursuant such action, law enforcement officers went to the Brown's grocery store near Hays, Montana, and searched said premises, returning an execution of search warrant to the Tribal Court.

VI.

That in returning said property to the Tribal Court, Bureau of Indian Affairs Criminal Investigator, Robert J. Ironmaker, Sr., who was in charge of the search, allowed the property seized in the search to be released to deputies of Blaine County Sheriff Glenn Huestis for storage in a garage, because the Bureau of Indian Affairs lacked a suitable place for storage.

VII.

That sometime later the State of Montana, through the office of the Blaine County Attorney, who may or may not have consulted with the Attorney General's office, caused certain felony charges to be filed in State District Court in Blaine County, Montana, in a cause entitled State of Montana, plaintiff, vs. Harley Leroy Brown and Caroline Ann Brown, defendants, Cause No 1199.

VIII.

That on or about January 12, 1988, after the initial appearance of Harley and Caroline Brown in the Tribal Court matters, said Criminal Investigator Robert Ironmaker requested the Tribal court charges involved therein to be dismissed, as he related that charges would be pursued in state or federal court. That pursuant such request, the Tribal Prosecutor, John Contway, filed a Motion in Tribal Court to dismiss the actions against Caroline and Harley Brown. The tribal court issued an Order dismissing the charges against Caroline and Harley Brown without prejudice.

IX.

That at no time subsequent thereto until a Motion to return property was filed by counsel for Caroline and Harley Brown, was the Court approached to authorize transfer of the property seized in the search warrant to the State of Montana or was there otherwise an order issued pursuant such seizure. In October, 1989, over 18 months later, the Browns moved the Tribal Court that the

property seized under the Tribal Court action be returned, as nothing further was pursued in Tribal Court.

X.

That after response to the Motion was filed by the Tribal Prosecutor the Tribal Court issued an Order directing the property be returned to the Browns. (See attachment "A").

XI.

That apparently in response thereto, with the expressed desire to avoid the Order of the Tribal Judge, Sheriff Glenn Huestis contacted the Blaine County Attorney, Donald Ranstrom, and he, in turn, caused a Petition for a Protective Order to be filed in the pending criminal action against Harley and Caroline Brown, asking for apparent permission to disobey the Tribal Court Order.

XII.

Judge Leonard Langen, in an Order issued on or about November 15, 1989, granted the request of the Blaine County Attorney, and in pertinent part, ordered " . . . that all the law enforcement officers and officers of this Court shall be excused from complying with any Tribal Court order to the contrary", referring to the ordered return of the evidence seized on or about January 6, 1988, from the Browns' store. (See attachment "B").

XIII.

That Harley Brown and Caroline Brown are each members of federally recognized Indian tribes, doing business on land that is held in trust status within the boundaries of the Fort Belknap Indian Reservation.

XIV.

That the Fort Belknap Community Council, through the Fort Belknap Indian Community Tribal Court, in receiving the Complaints and issuing arrest warrants and search warrants on or about January 6, 1988, was exercising its authority over Indians within the boundaries of the Fort Belknap Indian Reservation, as an approved Tribal government, under the Indian Reorganization Act of 1934.

XV.

That said powers are exercised pursuant an established Tribal Code, specifically Sect. 1.81 of Title V of the Fort Belknap Tribal Code. It was asserted to the Court in the original Complaints of January 6, 1988, that the Browns were in violation of existing tribal law, Resolution Numbers 3-74 and 3-77. That in exercising such authority, the Fort Belknap Community Tribal Court was invoking the jurisdiction specifically granted to that Court under the Tribal Code, duly adopted by the Fort Belknap Community Council.

XVI.

That because in excess of 18 months had passed since any action had taken place in the Tribal Court proceeding, and because said action had been formally dismissed, it was a reasonable exercise of Tribal Authority to order that evidence seized pursuant its search warrant be returned to the owners thereof, Caroline and Harley Brown.

XVII.

That said action was taken pursuant an appropriate Motion, with an adequate opportunity provided to the Tribal Prosecutor to respond and approve or disapprove of said Motion.

XVIII.

That the defendants, either themselves or through various agents, have sought to specifically frustrate this exercise of tribal sovereignty, by seeking, without a hearing, to ignore the lawful orders of the Tribal Court. The defendants filed nothing in Tribal Court to seek "protection" or other action.

XIX.

That pursuant the search warrant of January 6, 1988, the deputies of Blaine County Sheriff, Glenn Huestis, were acting as agents of the Tribal Court, as storage thereof was done strictly for convenience purposes, and there was no order or application made for an order

transferring said property to the formal jurisdiction of the State of Montana.

XX.

That in as much as property being held was taken and held pursuant the Tribal court search warrant, the Tribal Court maintained authority over said property until such time it ordered otherwise.

XXI.

That the defendants, either directly, or in concert with others, in choosing to deny the lawful Orders of the Tribal Court, having frustrated the ability of the Fort Belknap Community Council, Fort Belknap Community Tribal Court, and their various agencies and subentities, to exercise reasonable forms of self government as guaranteed by the Indian Reorganization Act of 1934, and existing tribal sovereignty.

XXII.

That secondly, the defendants have wrongfully sought to enforce the criminal laws of the State of Montana against Tribal members acting wholly within the boundaries of the Fort Belknap Indian Reservation, in spite of Tribal laws in place which provide state recognized means of enforcement of liquor regulation. Such action has also frustrated the ability of the Fort Belknap Indian Community to govern itself, has misrepresented the Community's willingness to exercise such authority,

and has precipitated a growing rift in cooperation between law enforcement agencies at the local level.

WHEREFORE, IT IS RESPECTFULLY REQUESTED that this Court enter an Order granting the plaintiff the following relief:

1. That this Court enter a declaratory judgment finding that one or both of the defendants or those under there [sic] charge have illegally infringed upon the right of the Fort Belknap Indian Community to govern itself and its people by wrongfully seeking to countermand a valid court order of the Fort Belknap Indian Community Tribal Court.

2. That this Court enter a declaratory judgment finding that one or both of the defendants or those under there [sic] charge have illegally infringed upon the right of the Fort Belknap Indian Community to govern itself by attempting to enforce State of Montana criminal laws within the boundaries of the Fort Belknap Indian Reservation against Indians enrolled in federally recognized Tribes, frustrating Tribal attempts to enforce its own criminal laws, which are similar to the State of Montana's.

3. That this Court permanently enjoin the defendants and those under their charge from interfering with the lawful orders of the Fort Belknap Indian Community Tribal Court concerning certain evidence seized from Harley and Caroline Brown, and further, permanently enjoin the defendants and those under their charge from all attempts at enforcing State of Montana criminal laws in State Courts against members of federally recognized Indian tribes within the boundaries of the Fort Belknap Indian Reservation.

4. For such further relief this Court deems necessary and appropriate, as allowed by law

RESPECTFULLY SUBMITTED this 30th day of April, 1992.

/s/ James Vogel
James Vogel
Attorney for the Fort Belknap
Indian Community

No. 88-487

IN THE SUPREME COURT OF THE
STATE OF MONTANA

1989

CAROLINE ANN BROWN AND
HARLEY LEROY BROWN,

Petitioners,

-vs-

DISTRICT COURT OF THE SEVENTEENTH
JUDICIAL DISTRICT FOR THE STATE
OF MONTANA, IN AND FOR THE
COUNTY OF BLAINE, and THE
HONORABLE LEONARD LANGEN,
a Judge thereof,

Respondents.

ORIGINAL PROCEEDING:

COUNSEL OF RECORD:

For Petitioner:

Frisbee, Moore, Stufft & Olson; Jayne Mitchell, Cut Bank, Montana

For Respondent:

Hon. Marc Racicot, Attorney General, Helena, Montana
Clay Smith, Solicitor, Attorney General's Office
Donald Ranstrom, County Attorney, Chinook, Montana

Submitted on Briefs: Dec. 14, 1988
Decided: July 19, 1989

Filed: July 19, 1989

/s/ Illegible
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The United States Supreme Court in Rice, Director, Department of Alcoholic Beverage Control of California v. Rehner (hereafter *Rice v. Rehner*) (1983), 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961, decided that Congress, by enacting 18 U.S.C. § 1161, gave states the power to regulate within their borders the possession and sale of liquor by Indian persons in Indian country through the licensing provisions of the states. Our case here answers the further problem: whether such liquor regulation by the states includes the power to enforce state criminal statutes against Indian persons for violations of state law relating to the possession or the sale of liquor within Indian country. We hold here that under *Rice v. Rehner*, and the applicable federal statute, Montana can, and does, have the power to punish by criminal proceedings in its state courts violations of state liquor laws occurring within its borders by Indian persons in Indian country. Because of our holding, we deny the petition for a writ of supervisory control from this Court, and dismiss these proceedings.

In *Rice v. Rehner*, the pivotal case here, Rehner was a federally licensed Indian trader who operated a general

store on the Pala Reservation in San Diego, California. The Pala Tribe had adopted a tribal ordinance permitting the sale of liquor on the reservation, providing that the sales conformed to state law. Rehner sought from the state an exemption from its law requiring a state license for retail sale of liquor for off-premises consumption. When she was refused an exemption, Rehner filed suit seeking a declaratory judgment that she was not required to obtain a license from the state and an order directing that liquor wholesalers could sell to her without her state license. The federal district court granted the state's motion to dismiss, ruling that Rehner was required to have a state license under 18 U.S.C. § 1161. The Court of Appeals reversed the district court, holding that § 1161 did not confer jurisdiction on the states to require liquor licenses. (9th Cir. 1982), 678 F.2d 1340. On writ of certiorari, the United States Supreme Court, as above noted, reversed the Court of Appeals, holding that California may properly require Rehner to obtain a state license in order to sell liquor for off-premises consumption.

As noted by the dissent in *Rice v. Rehner,* the United States Supreme Court rested its conclusion on three propositions. 463 U.S. at 738 (Blackmun, J., dissenting). First, the Supreme Court asserted that "tradition simply has not recognized sovereign immunity or inherent authority in favor of liquor regulation by Indians." Second, the Supreme Court found a "historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country." Third, the Supreme Court concluded that Congress "authorized . . . state regulation over Indian liquor transactions" by enacting 18 U.S.C. § 1161.

The principal argument of the petitioners (hereafter Brown or Browns) is that *Rice v. Rehner* held only that the states could require Indians transacting liquor business on the reservation to purchase a state liquor license. They argue that *Rice v. Rehner* did not, however, and could not, confer on the state criminal jurisdiction over liquor offenses committed by Indians on the reservation, contending that criminal jurisdiction over Indians can only be conferred upon the states by Congress with the express consent of the tribe. They argue that Montana has not been given such a grant of criminal jurisdiction.

The facts in this case parallel somewhat the facts in *Rice v. Rehner.* This action arises from an information filed in Blaine County District Court, charging Harley LeRoy Brown and Caroline Ann Brown with the felony offense of sale and possession of beer and wine without a license in violation of Montana's statute, § 16-6-301(1), MCA. Caroline Ann Brown is an enrolled member of the Fort Belknap Tribal Community of the Assiniboine and Gros Ventre Tribes. Harley LeRoy Brown is an Indian person residing on the Fort Belknap Reservation and is the husband of Caroline Anne Brown and the head of an Indian family. The Browns operate a small grocery store at Hays, Montana, selling groceries, as well as beer and wine. At the time of the alleged offense, they claim they had a valid tribal and federal license authorizing them to sell beer and wine. The District Court, however, noted that the Browns had not obtained from the tribe such a liquor license.

On January 6, 1988, the Blaine County Attorney caused a state search warrant to be issued from the Blaine County Justice Court. Law enforcement officials

attempted to execute the Blaine County search warrant on the reservation; but were told by the chief tribal judge of the Fort Belknap Tribal Court that the search warrant was invalid because the state had no jurisdiction on the reservation. Apparently, the state officers then caused an action to be filed in Tribal Court charging the Browns with criminal violations of tribal ordinances relating to the sale and display of liquor on the reservation. Under the charges filed in the Tribal Court, a search warrant was issued from that Court under which evidence was seized from the grocery store at Hays, Montana; and transported to Blaine County District Court. The evidence was not taken to the Tribal Court and it is contended that the tribal search warrant was not served upon Caroline Ann Brown, from whose possession the evidence was seized. Following the seizure and transport of the evidence, the Tribal Court action was dismissed. State court charges were filed against the Browns on February 4, 1988, after the Tribal Court action was dismissed.

On April 6, 1988, Browns moved to dismiss the charges against them on grounds that the Montana State District Court did not have criminal jurisdiction over Indians who allegedly committed crimes within the exterior boundaries of the reservation. The defendants further moved to quash the search warrant and suppress the evidence seized under the Tribal Court search warrant, which evidence had been transferred to the state court.

On August 6, 1988, the District Court denied both the motion to dismiss and the motion to quash. In denying the motion to dismiss, the District Court relied on *Rice v. Rehner* particularly. Thereupon, the petitioners filed their application for a writ of supervisory control or other

appropriate writ from this Court to review the issue of jurisdiction, and the issue of whether the evidence should be suppressed.

Under Title 18 U.S.C. §§ 1154, 1156, 3113, and 3488, introduction of liquor, possession thereof, dispensing thereof or transporting the same is forbidden in Indian country. As noted in *Rice v. Rehner*, 463 U.S. 722, Congress imposed complete prohibition of liquor on Indian lands in Indian country in 1832 and "these prohibitions are still in effect subject to suspension, conditioned on compliance with state law and tribal ordinance." The United States Supreme Court derived that statement from the provisions of Title 18 U.S.C. § 1161, which follow:

"The provisions of 1154, 1156, 3113, 3488 and 3618 of this title shall not apply within any area that is not Indian country nor to any act or transaction within any area of Indian country provided such act *or transaction is in conformity both with the laws of the state in which such act or transaction occurs* and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . " (Emphasis added.)

Plainly, under the language of § 1161, two things are necessary to remove the federal prohibition against liquor in Indian country: (1) conformity with the laws of the state in which the transaction occurs; and (2) an ordinance duly adopted by the tribe having jurisdiction over the area of Indian country. In this case, the Fort Belknap Indian Community adopted its Tribal Ordinance No. 3-74 in 1974, which regulates liquor transactions on the reservation under the jurisdiction of the Fort Belknap Indian

community "provided that such introduction, sale or possession is in conformity with the laws of the state of Montana."

The principal argument of Brown in this case is that *Rice v. Rehner* was a civil case, which only held that Indians transacting a liquor business on the reservation must purchase a state liquor license; and that it did not give state courts criminal jurisdiction over Indians who commit liquor offenses on the reservation. Brown contends that criminal jurisdiction over Indians can only be conferred upon the states by Congress by the express consent of the tribe. 18 U.S.C. § 1162. They contend that Montana has not been given such a grant of criminal jurisdiction.

Such an interpretation would be a narrow construction of 18 U.S.C. § 1161 and would overlook the specific reference in *Rice v. Rehner* that Congress has also historically permitted concurrent state regulation through the "imposition of criminal penalties on those who supply Indians with liquor, or who introduce liquor into Indian country." 463 U.S. at 726, 103 S.Ct. at 3299. The interpretation ignores also the obvious determination in *Rice v. Rehner* that the state was entitled to effective regulation of liquor, the Supreme Court saying:

"The historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests involved. See *Confederated Tribes*, supra, 447 U.S. at 156, 65 L.Ed.2d 10, 100 S.Ct. 2069. Rehner's distribution of liquor has a significant impact beyond the

limits of the Pala Reservation. The state has an unquestionable interest in liquor traffic that occurs within its borders, and this interest is independent of the authority conferred on the states by the Twenty-first Amendment. *Crowley v. Christiansen*, 137 U.S. 86, 91 (1890). Liquor sold by Rehner to other Pala tribal members or to nonmembers can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the state does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the state has no control. This particular 'spillover' effect is qualitatively different from any 'spillover' effects of income taxes or taxes on cigarettes. 'A state's regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state intervention.' *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 234, 65 L.Ed.2d 611, 103 S.Ct. 2378 (1983)."

Rice v. Rehner, 463 U.S. at 724.

In this case, the district judge particularly noted the "spillover" effect, remarking that the state's regulatory interest was substantial because the Brown grocery was located on Montana State Highway No. 66, a state-maintained, two-lane paved highway, carrying non-Indian traffic from Billings, Montana, to the south; to Harlem, Montana, to the north. Moreover, *Rice v. Rehner* recognized that "it cannot be doubted that the state's police power over liquor transactions within its borders is broad enough to protect the same Congressional decision in favor of the state" [by allowing removal of the prohibition against liquor on reservations from transactions that conform both with the laws of the state and with a tribal ordinance]. 463 U.S. at 731.

The second principal argument made by Brown is that the Fort Belknap community has preempted the field by asserting exclusive jurisdiction over liquor offenses on the reservation. In support, they point to the criminal prosecution ordinances adopted by the tribe which provide procedures in the tribal courts for crimes committed on the reservation. They also point to Resolution No. 71-88, adopted by the tribal community on April 6, 1988, after the institution of the criminal action in this case. Resolution No. 71-88 declared in effect that its previously adopted ordinance allowing the use and sale of alcoholic beverages on the reservation did not cede or authorize jurisdiction within the reservation to the state of Montana.

For these contentions, the Browns rely on *State of Wisconsin v. Big John* (Wis. Ct. App. 1987), 409 N.W.2d 455; and upon the federal decisions in *U.S. v. Cowboy* (10th Cir. 1982), 694 F.2d 1228; *U.S. v. Johnson* (9th Cir. 1980), 637 F.2d 1224; and *U.S. v. Allen* (8th Cir. 1978), 574 F.2d 435.

State v. Big John, supra, has no application in this cause because it involved the state's attempt to regulate the use of boats in Wisconsin, an activity well within the traditional area of Indian tribal sovereignty. *Rice v. Rehner* specifically pointed out that the regulation of liquor on reservations was not within the inherent or historical tribal sovereignty. The federal cases likewise do not support Brown in this case. *U.S. v. Allen*, supra, involved an assault by an Indian against other Indians on a reservation and has no connection with the interpretation of Indian liquor laws except that the parties were drinking when the assault occurred. *U.S. v. Johnson*, supra, held

that offenses by an Indian against an Indian are subject to the jurisdiction of the Tribal Courts if not covered by the Major Crimes Act, in a case construing the federal Juvenile Delinquency Act. *U.S. v. Cowboy*, supra, held that the tribal courts had concurrent jurisdiction with the federal courts over Indians who offend 18 U.S.C. § 1154 (dispensing liquor). No state statutes were involved and the court there did not pass upon the application of state criminal laws under 18 U.S.C. § 1161.

The state district court in this case rejected the preemption argument pointing to the language in *Rice v. Rehner*, which said:

" . . . Our examination of § 1161 leads us to conclude that Congress authorized, rather than preempted state regulation over Indian liquor transactions."

463 U.S. at 726.

Again, the District Court noted from *Rice v. Rehner*:

"It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian liquor transactions as long as those transactions conformed both with tribal ordinances and state law. It is also clear that Congress contemplated that its absolute, but not exclusive power, to regulate Indian liquor transactions would be delegated to the tribes themselves and to the states, which historically shared concurrent jurisdiction with the federal government in the same area . . . "

463 U.S. at 728.

We agree with the District Court that preemption has not occurred here. In sum, we hold that when Congress

decided to allow the end of prohibition of liquor on reservations in certain cases, it did so under the conditions that state law and tribal ordinances would regulate liquor transactions in Indian country. If we were to interpret 18 U.S.C. § 1161 as permitting only state licensing of liquor transactions on Indian reservations, but not the power to enforce the same, the state would be powerless to effectuate the intent of Congress that such liquor transactions on reservations be "in conformity with state law."

Rice v. Rehner, supra, was decided by a divided court, but its majority holding clearly implies that state criminal laws relating to liquor transgressions apply to offenses committed by Indians in Indian country. We so hold.

With respect to the second portion of Browns' petition for writ in this cause asking us to direct the suppression of the evidence seized under the tribal search warrant, we find this issue to be premature because Browns have a clear remedy by appeal. The order denying suppression of the evidence is interlocutory and in such case a writ of supervisory control from this Court is not obtainable.

The application for writ of supervisory control is denied and these proceedings dismissed.

MR. CHIEF JUSTICE TURNAGE and MR. JUSTICES HARRISON, GULBRANDSON, McDONOUGH, HUNT and WEBER concur.